UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MERVIN CLARENCE HALE,

Appellant, :

v. :

No. 21588

UNITED STATES OF AMERICA, :

Appellee. :

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APPELLEE'S BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HAVRE-GLASGOW DIVISION

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JURISDICTION

After waiving prosecution by indictment, an information was filed charging appellant with an assault with a dangerous weapon in violation of 18 U.S.C., Sections 1153 and 113(c). A guilty verdict was returned after trial by jury on April 12, 1966. Notice of appeal was filed by appellant on April 14, 1966.

The jurisdiction of the district court was founded upon 18 U.S.C., Section 3231. Jurisdiction of this Court on appeal is predicated upon 28 U.S.C., Section 1291.

ARGUMENT

Appellant has specified as error two instructions of the lower court and the failure of the lower court to instruct as to a particular matter. Each of the specifications will be dealt with separately below.

Neither of the instructions given nor the omission complained of were objected to as required by Rule 30, Federal Rules of Criminal Procedure. Therefore, appellant, of necessity, relies upon the plain error rule. Rule 52(b), Federal Rules of Criminal Procedure. "Plain error" means "prejudicial error." Herzog v. United States, 226 F.2d 561, 569 (C.A. 9, 1955). Plain error is that which affects substantial rights. Helms v. United States, 340 F.2d 15 (C.A. 5, 1965), cert. denied, 382 U.S. 814. Harmless error must be disregarded. Helton v. United States, 221 F.2d 338 (C.A. 5, 1955). Error which in a close case might call for a reversal may be disregarded as harmless where evidence of guilt is strong. Lutwak v. United States, 344 U.S. 604, 619 (1953); Thomas v. United States, 281 F.2d 132 (C.A. 8, 1960), cert. denied, 364 U.S. 904. The rule is designed to avoid "manifest injustice." Beasley v. United States, 327 F.2d 566 (C.A. 10, 1964), cert. denied, 377 U.S. 944.

In reviewing instructions, they must be considered as a whole. Beck v. United States, 298 F.2d 622, 634 (C.A. 9, 1962), cert.

denied, 370 U.S. 919.

I.

Appellant's first specification of error attacks one portion of the lower court's instruction on proof of intent. The full instruction may be found at lines 12 - 25 on page 53 and lines 1 - 9 on page 54 of the transcript. This instruction is identical to the one found in Mathes and Devitt, Federal Jury Practice and Instructions, (1965), §10.06. Appellant admits that the first sentence of the portion of the instruction is correct.

> Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent from the overt acts. The law * * * assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. (Cramer v. United States, 325 U.S. 1, 31 (1945)).

However, the appellant contends that the second sentence of the portion "created an impression on the jury that the jury must presume the appellant acted with intent to do bodily harm until the presumption is rebutted by evidence of the defense." Appt's Brief at p. 2. (Emphasis supplied). In truth, the second sentence merely rephrases the first and explains the rule therein. There is no requirement that the jury must presume, for the sentence uses the term "may draw the inference." (Emphasis supplied). It is difficult to comprehend appellant's argument that the first

sentence is correct, but that the second sentence constitutes plain error.

Appellant urges upon this Court the holding of the Fifth Circuit in Mann v. United States, 319 F.2d 404 (C.A. 5, 1963), that under the facts extant in that case, such an instruction was erroneous. The Mann case was an income-tax evasion prosecution. In an income-tax evasion case before this Court, the instruction, when considered with the other instructions, was held to be correct. Sherwin v. United States, 320 F.2d 137 (C.A. 9, 1963). Petitions for certiorari in both cases were denied: Sherwin v. United States, 375 U.S. 964, Reh. denied, 376 U.S. 946; United States v. Mann, 375 U.S. 986.

As this Court noted in Sherwin at 149:

> Here the language relating to the inference that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted * * * followed an instruction on the question of proving intent by circumstantial evidence; thereafter, following the description of the charges made in the indictment and other instructions on various phases of the case, the court listed the three essential elements which were required to be proved in order to establish the offense charged /including the element of specific intent/.

In the instant case, the instruction on the inference followed an instruction on proving intent by circumstantial evidence (Tr. 53) and was followed itself by an instruction on four essential

elements, including: "Third, that the act was done with the intent to do bodily harm to Martin David DeMarrias." (Tr. 55).

And as in Sherwin, the lower court here instructed that "* * * specific intent must be proved before there can be a conviction." (Tr. 53). Sherwin at 149.

The charge given here is replete with instructions as to proof of intent:

> The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. (Tr. 52).
>
> With respect to major crimes, such as charged in this case, specific intent must be proved before there can be a conviction. (Tr. 53).
>
> * * * the burden is upon the prosecution to prove beyond reasonable doubt every essential element /including intent to do bodily harm/. (Tr. 55).

This Court has repeatedly approved instructions which include the one complained of here, when such instructions are considered as a whole. Armstrong v. United States, 327 F.2d 189 (C.A. 9, 1964); Turf Center, Inc. v. United States, 325 F.2d 793 (C.A. 9, 1963); Baker v. United States, 310 F.2d 924 (C.A. 9, 1962), cert. denied, 372 U.S. 954; Legatos v. United States, 222 F.2d 678 (C.A. 9, 1955).

Even the Fifth Circuit has distinguished its own holding in Mann v. United States, supra, where, as here, the inference was predicated upon affirmative acts. Helms v. United States, 340

F.2d 15 (C.A. 5, 1964), cert. denied, 382 U.S. 814; Estes v. United States, 335 F.2d 609 (C.A. 5, 1964), cert. denied, 379 U.S. 964, Reh. denied, 380 U.S. 926.

It is submitted that a review of the transcript amply demonstrates that proof of appellant's guilt was strong and uncontradicted. The jury required no more than fifty minutes to deliberate. (Tr. 61). It is submitted the complained-of instruction cannot in any way be deemed plain error. It is further submitted that even had the instruction been objected to, it would not constitute reversible error.

II.

Appellant contends, in his second specification of error, that the lower court committed plain error in failing "* * * to instruct the jury that it must find the accused not guilty if it believed him innocent or if the government did not prove its case * * *." (Appt's Brief, p. 4).

While a trial judge must admonish the jury of its duty to return a not guilty verdict if upon all the evidence it is not convinced of guilt beyond a reasonable doubt, United States v. Pape, 144 F.2d 778 (C.A. 2, 1944), cert. denied, 323 U.S. 752, the trial judge need not follow a definite ritual using the precise words found in other decisions. United States v. Meisch, 370 F.2d 768 (C.A. 3, 1966).

It is submitted that the lower court more than adequately instructed the jury on this point:

> * * * the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case. (Tr. 48).
>
> Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. (Tr. 49).
>
> As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply require that, before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case. (Tr. 50).
>
> Unless and until outweighed by evidence in the case to the contrary, the law presumes that a person is innocent of crime or wrong * * *. (Tr. 51).
>
> The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt. (Tr. 52).
>
> * * * the burden is upon the prosecution to prove beyond reasonable doubt every essential element of the crime charged in the information. (Tr. 55).

Appellant contends, in this connection, that the trial court's failure to so instruct gave the jury the impression that the court was of the opinion that the defendant was guilty. This too, is amply refuted by the court's instructions:

> This court expresses no opinion whatever about the facts and circumstances of the case. (Tr. 57).
>
> It is proper to add the caution that nothing said in these instructions -- nothing in any form of verdict prepared for your convenience -- is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jury. (Tr. 60).

The court in no way so impressed the jury. It did in fact fully instruct the jury on this particular point, although perhaps not in the precise language now deemed appropriate by appellant.

III.

Appellant's third and last specification of error concerns a portion of the lower court's charge that "/a/ mere attack with fists, a fist fight, is no excuse and no justification for the use of a dangerous weapon." (Tr. 57). The defendant has, once again, taken only a portion of an instruction out of context and viewed it in isolation contrary to the rule that the instructions must be viewed as a whole. The entire instruction on this particular point is found at page 57 of the transcript at lines 1 through 23. A reading of Lujan v. United States, 209 F.2d 190 (C.A. 10, 1953), readily shows that this instruction is almost identical, word-for-word, to the one approved there. The Tenth Circuit stated there, commencing at 193:

The Appellant complains of the instructions of the court to the effect that as a rule a mere attack with fists is no excuse or justification for the use of a dangerous weapon. Quoting from 26 Am. Jur. 255 §142, it is said, "An assault with fists may be sufficient under some circumstances to create a belief that it is necessary to kill," and that the instructions of the court had the effect of vitiating his plea of self defense.

Of course, if the challenged statement in the instructions is construed to exclude an assault with fists as justifying the use of a deadly weapon in self defense, the instruction may be subject to criticism on that score.

But the Appellant apparently overlooked the next sentence in the quoted treatise to the effect that a fistic assault is sufficient to create a reasonable belief of the necessity to use a deadly weapon "only in extreme cases, for a blow with the hand can hardly be deemed to warrant a resort to a deadly weapon." Accepting this whole statement as applicable to an assault with a deadly weapon, we think it does no more than support the trial court's explanation that as a rule a mere attack with fists was no excuse or justification for the use of a dangerous weapon.

In any event the statement, considered in its proper context, did not deprive the Appellant of his plea of self defense. The court was at pains to instruct the jury in accordance with ancient and accepted rules that "if a person is assaulted with such fierce force and violence by another that this own life is threatened, or is in great danger of receiving great bodily harm, then he may resort to whatever means may be necessary to repel the assault and to protect himself from great bodily harm, or in the defense of his own life. A person is not required to flee from an assailant, and he may stand his ground and defend himself." The jury was further told, however, that "in order to constitute a legal excuse or justification or justify the use of a dangerous

> weapon in protecting one's self, the assault must be so fierce and so violent that the person assaulted, as a reasonable man, actually believes it is necessary to use a dangerous weapon to repel the assault and * * * safeguard his own life." Then followed the statement that "a mere attack with fists, a fist fight, is no excuse and no justification for the use of a dangerous weapon." But the court did not stop there. It went on to tell the jury that it expressed no opinion whatever about the facts and circumstances of the case. That it was for them to determine from the evidence whether the self defense interposed by the defendant in the case was based upon truth and that the use of the deadly weapon was to protect himself as a reasonable man from receiving great bodily harm or in the defense of his life, or whether it was a mere pretext.
>
> The ultimate question whether the fistic assault, if one did in fact occur, justified the use of the deadly weapon, was thus left for the determination of the jury. The court's comment that as a rule a mere attack with fists, or fist fight, was no justification for the use of the dangerous weapon did not deprive the Appellant of his plea of self defense. It merely stated the legal standard by which it should be judged. We think the instructions clearly stated the law and that they were eminently fair to the Appellant's plea under the testimony.

Although appellant's contention "* * * that as a matter of law it cannot be unequivocally stated, as it was here, that a fist fight is no excuse for the use of a dangerous weapon," (Appt's Brief, p. 57), is basically sound, it is apparent that there was no such unequivocal statement here. Rather, the instruction was merely an expanded explanation of the basic rule that --

> * * *if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of lawful self-defense. (Brown v. United States, 256 U.S. 335, 342 (1921)).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted this 25th day of July, 1967.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Assistant United States Attorney
for the District of Montana.

UNITED STATES OF AMERICA)
: ss A F F I D A V I T
DISTRICT OF MONTANA.)

ARTHUR W. AYERS, JR., being first duly sworn, deposes and says:

That he has this 25th day of July, 1967, deposited three copies of the foregoing Appellee's Brief in the United States mails, postage prepaid, to appellant's attorney at the following last known address:

David G. Ferrari, Esq.
Attorney at Law
777 North First St. Suite 600
San Jose, California

Arthur W. Ayers, Jr.
ARTHUR W. AYERS, JR.

Subscribed and sworn to before me this 25th day of July, 1967.

Elaine E. MacLeod
Deputy Clerk, U. S. District Court,
District of Montana.